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IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL.,
Petitioners,

v.

GEORGE W. BUSH,
President of The United States, ET AL.,
Respondents.

KHALED A. F. AL ODAH, Next Friend of FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF PROFESSORS OF CONSTITUTIONAL LAW AND FEDERAL JURISDICTION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

Amici curiae, listed fully in the Appendix, are 24 professors of constitutional law and federal jurisdiction with expertise in the constitutional law of habeas corpus. They submit this brief to demonstrate both the unconstitutionality of the court of appeals' interpretation of § 7 of the Military Commissions Act of 2006 and the availability of habeas corpus to alien detainees being held at the Guantanamo Bay Naval Base.

SUMMARY OF ARGUMENT

Petitioners were seized and transported halfway around the world to be held at the Guantanamo Bay Naval Base, Cuba. Three years ago, this Court held in *Rasul v. Bush*, 542 U.S. 466 (2004), that they had a right to habeas corpus review of the lawfulness of their detention. Respondents now claim that Congress abolished petitioners' right by enacting the Military Commissions Act of 2006 (MCA), and acted constitutionally in doing so. The court of appeals agreed, reasoning that the MCA abridged no rights protected by the Suspension Clause, because "the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government." *Boumediene v. Bush*, 476 F.3d at 981, 990-91 (D.C. Cir. 2007).

Abolishing petitioners' rights to habeas corpus without providing an adequate and effective alternative remedy would violate the Suspension Clause of the Constitution, Article I, § 9. The Suspension Clause prohibits permanent abrogation of the writ for a category of claims within its scope. Aliens, like citizens, have a constitutional right to habeas corpus,

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than Amici and their counsel, has made a monetary contribution to the preparation or submission of this brief.

which historically has included the right of enemy aliens and prisoners of war to challenge the legality of their detention. Even during a war on terror, absent a valid suspension, the writ "has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law." *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion).

This constitutional requirement cannot be evaded by detaining petitioners on Guantanamo. As *Rasul* established, although the United States lacks ultimate sovereignty at Guantanamo, it has exclusive governing authority there, exercising complete jurisdiction and control. Under the rationale of the *Insular Cases*, fundamental constitutional rights apply to both citizens and foreign nationals in such a location. The courts have consistently so held in comparable territories, where the United States has exercised sovereign powers without titular sovereignty. Nor would enforcing petitioners' fundamental constitutional right to habeas corpus at Guantanamo be "impracticable and anomalous." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring).

Petitioners were deliberately transported to a highly secure base at the very threshold of the United States, to be detained, interrogated, tried and perhaps even executed. Serious questions exist regarding the basis for their detention. What would be anomalous is authorizing the United States indefinitely to evade the Constitution by imprisonment in such a "rights-free zone," with no possibility for habeas review.

I. AS INTERPRETED BY THE COURT BELOW, MCA § 7 IS AN UNCONSTITUTIONAL PERMANENT ABROGATION OF THE WRIT

"The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient

cause. It is in the nature of a writ of error, to examine the legality of commitment." *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-202 (1830) (Marshall, C.J.). The "Privilege of the Writ of Habeas Corpus" was one of the few constitutional rights enshrined by the Framers in the original Constitution of 1787. The Suspension Clause of Article I, § 9, prohibits Congress from suspending the writ "unless when in Cases of Rebellion or Invasion the public Safety may require it." Congress's power to define the jurisdiction of the lower federal courts accordingly is subject to the explicit limit of the Suspension Clause. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1393, 1397 (1953).

The Framers narrowly defined the legislature's power to suspend in order to preserve the writ against both temporary and permanent evisceration. Yet the court of appeals interpreted MCA § 7 as permanently eliminating petitioners' access to habeas corpus, regardless of whether it provides an adequate alternative remedy. As so interpreted, the statute clearly violates the Suspension Clause.[2]

A. MCA § 7 Permanently Abrogates Habeas Corpus

The MCA provides: "No court, justice or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7 (amending 28

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[2] For the reasons stated by the dissenting opinions in the court below, 476 F.3d at 1005-07 (Rogers, J., dissenting), and in *Bismullah v. Gates*, ___ F.3d ___, 2007 WL 2067938, at *13-14 (D.C. Cir. July 20, 2007) (Rogers, J., concurring), Amici doubt that the Detainee Treatment Act is capable of providing an adequate and effective alternative means for reviewing the lawfulness of petitioners' detention.

U.S.C. § 2241(e)(1)). While its precise scope has not been determined, MCA § 7 plainly is not, and does not purport to be, an exercise of Congress's authority to suspend the writ temporarily "in cases of Rebellion or Invasion." Its language does not speak of suspension. Opponents of the legislation repeatedly stated, without contradiction, that there was no current "Rebellion or Invasion" that could justify suspending the writ. *See, e.g.*, 152 Cong. Rec. S10368 (daily ed. Sept. 28, 2006) (Sen. Specter) ("Fact No. 3, uncontested. We do not have a rebellion or an invasion.").

The MCA's prohibition of habeas corpus jurisdiction is permanent, not limited to a particular span of years or the duration of a particular emergency. Instead, it permanently alters the federal habeas corpus statute. The legislative history confirms that the proponents of the MCA did not intend to enact a temporary measure. *See* 152 Cong. Rec. S10404 (daily ed. Sept. 28, 2006) (Sen. Sessions) ("We are legislating through this law for future generations [and] future wars"); *id.* at S10270 (daily ed. Sept. 27, 2006) (Sen. Kyl) ("all future conflicts").[3]

B. The Suspension Clause Prohibits Permanent Abrogation Of The Writ

Permanently abolishing the writ of habeas corpus for certain persons violates the Suspension Clause on its face. By limiting Congress's power to suspend habeas to cases of

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[3] Neither can MCA § 7 be viewed as limited to the lower federal courts, leaving unimpaired the jurisdiction of this Court and the state courts. The Act's plain language bars jurisdiction by any "court, justice or judge" in relevant cases, and nowhere invites reconsideration of the long-established doctrine denying the power of state courts to review federal detention. *See Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872). Moreover, the constitutional limits on this Court's original jurisdiction would forbid the Court to serve as a court of initial jurisdiction for habeas inquiry into executive detention in such cases. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-101 (1807).

"Rebellion or Invasion" where "the public Safety may require it," the Clause necessarily precludes other abridgments of the writ. Logically, personal liberty would be even more threatened by a power of permanent abrogation than by a broad power of temporary suspension. Reading the Suspension Clause as prohibiting permanent abridgements *a fortiori* is also consistent with the interpretation of other constitutional provisions, such as the Takings Clause.[4]

This Court has always understood the Suspension Clause as prohibiting permanent deprivation, as well as limiting temporary withdrawal, of the writ. *See, e.g., Ex parte Bollman*, 8 U.S. at 95 (asserting that the Suspension Clause obligates Congress to provide for the writ).[5] The Court has repeatedly viewed statutes permanently modifying habeas jurisdiction as raising potential Suspension Clause problems. *INS v. St. Cyr*, 533 U.S. 289 (2001); *Swain v. Pressley*, 430 U.S. 372, 381 (1977). State supreme courts concur that parallel state constitutional provisions deny any power to permanently abrogate the writ.[6]

Proponents of the federal Constitution fully understood that the Suspension Clause prohibited permanent abrogation.

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[4] Although the Takings Clause of the Fifth Amendment expressly states only "nor shall private property be taken for public use without just compensation," it has traditionally been understood as prohibiting all takings without a public purpose. *See Kelo v. City of New London*, 545 U.S. 469, 484 (2005).

[5] As this Court has made clear, Chief Justice Marshall's suggestion in *Bollman* that habeas corpus jurisdiction must be vested in the federal courts by statute, 8 U.S. at 93-95, in no sense implies that Congress has the power simply to abrogate the writ. *See St. Cyr*, 533 U.S. at 304 n.24.

[6] *See, e.g., Maryland House of Corr. v. Fields*, 703 A.2d 167, 175 (Md. 1997). All state constitutions have suspension clauses, usually modeled on the federal version. *See* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 Colum. Hum. Rts. L. Rev. 555, 585-87 (2002).

Alexander Hamilton affirmed the Constitution's "establishment of the writ of habeas corpus" in *The Federalist* No. 84, at 511 (Clinton Rossiter ed. 1961), and insisted that habeas corpus was "provided for in the most ample manner in the plan of the convention." *Id.* No. 83, at 499. Governor Edmund Randolph assured the Virginia ratifying convention that the "privilege is secured here by the Constitution, and is only to be suspended in cases of extreme emergency."[7]

In *INS v. St. Cyr*, this Court recently rejected the sole suggestion to the contrary. Although a dissenting opinion in that case briefly argued that the Suspension Clause was intended to regulate only temporary suspensions, not total abrogations, of the writ,[8] the majority squarely rejected that interpretation, 533 U.S. at 300-301 & 304 n.24, and the dissenter himself appears to have abandoned it three years later.[9] History firmly rebuts that dissenting argument. While four state ratifying conventions included habeas corpus clauses in the bills of rights that they proposed to add to the Constitution, these amendments mainly reflected their desire to guarantee habeas in plain language.[10] The Antifederalists

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[7] *Virginia Convention, Debates* (June 10, 1788), *reprinted in 9 The Documentary History of the Ratification of the Constitution* 1092, 1099 (John P. Kaminski & Gaspare J. Saladino eds., 1990). Early commentators, such as James Kent, William Rawle, and Joseph Story, agreed. *See* sources cited in Neuman, *supra* note 6, at 582-83 (2002).

[8] 533 U.S. at 336-38 (2001) (Scalia, J., dissenting).

[9] *Hamdi*, 542 U.S. at 554, 558, 575 (Scalia, J., dissenting).

[10] Thus, the bill of rights proposed by Virginia included a provision stating "That every freeman restrained of his liberty is entitled to a remedy to enquire into the lawfulness thereof, and to remove the same, if unlawful, and that such remedy ought not to be denied nor delayed." *Virginia Convention, Debates* (June 22, 1788), *reprinted in 10 Documentary History, supra* note 7, at 1550, 1552 ¶ 10. *See also* William F. Duker, *A Constitutional History of Habeas Corpus* 134-35 (1980) (explaining that this provision denied Congress the power to suspend the

who argued that the Constitution should not permit even temporary suspensions of the writ would undoubtedly have objected even more forcefully to a claim that the Constitution permitted total abrogations.

II. LIMITING MCA § 7 TO ALIENS ALLEGED TO BE ENEMY COMBATANTS DOES NOT CURE THE CONSTITUTIONAL INFIRMITY

Nor is Congress constitutionally entitled to abolish petitioners' right to the writ simply because they are noncitizens or even alleged alien enemies. The writ has always been afforded to aliens, in times of war and peace, including alleged and conceded enemy aliens and prisoners of war. The MCA nowhere defines the term "enemy combatant" for purposes of § 7, nor does any other statutory provision. But existing case law regarding the analogous categories of enemy aliens and prisoners of war demonstrates that aliens accused of being enemy combatants must have some opportunity to challenge the legality of their detention. Indeed, precisely because the concept of "enemy combatant" and the scope of the "war on terror" are ambiguous, there is even greater need for such detentions to be reviewed by an independent court.

A. The Suspension Clause Protects Aliens

This Court has observed that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). At the same time, this Court has left open the degree to which subsequent developments in habeas corpus doctrine may also be protected by the Suspension Clause. 533 U.S. at 300-301. Some subsequent developments have resulted from reasoned doctrinal elaboration of the

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writ at all); Neuman, *supra* note 6, at 573-80 (describing the origins of the habeas corpus provisions in the proposed bills of rights).

significance of habeas corpus in a system with a written Constitution.

In either case, there can be no question that aliens enjoy the protection of the writ. Both at common law and throughout this Nation's history, habeas corpus has been available to aliens. *St. Cyr*, 533 U.S. at 301. This includes both aliens who have entered the country voluntarily and aliens, like petitioners, brought involuntarily within its domain. *See, e.g., id.* at 302 n.16 (citing *Sommersett v. Stewart*, 20 How. St. Tr. 1, 79-82 (K.B.1772); *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K.B.1810); *King v. Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K.B.1759)); *see also* notes 15 and 17 *infra*.

The protection of noncitizens by the Suspension Clause is consistent with other fundamental constitutional guarantees. As this Court held in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), the Equal Protection and Due Process Clauses of the Fourteenth Amendment are "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *See also Plyler v. Doe*, 457 U.S. 202, 215 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (even if presence "unlawful, involuntary, or transitory"); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2681-82 (2006) (Roberts, C.J.) (quoting *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)). As set forth below, even noncitizen security detainees, such as enemy aliens and prisoners of war, have been entitled to the writ.

B. Enemy Aliens Are Entitled To Habeas Corpus

The concept of "enemy alien" reflects an earlier international practice permitting expulsion or detention of nationals of an enemy state during a declared war.[11] *See Brown v.*

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[11] International law now imposes greater restrictions on the detention of enemy civilians in wartime, in accordance with the Fourth Geneva Convention, which the United States ratified in 1955. *See* Convention

United States, 12 U.S. (8 Cranch) 110, 122-26 (1814) (Marshall, C.J.). The Alien Enemies Act of 1798 broadly authorized the President to detain, relocate, or deport aliens who were "natives, citizens, denizens, or subjects of the hostile nation." Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (current version codified at 50 U.S.C. §§ 21-24). Yet as early as 1813, in an unpublished judgment on circuit, Chief Justice Marshall released a conceded enemy alien on habeas because he had been detained without an opportunity to relocate, as required by the controlling regulations.[12] This Court itself ordered the release of a detained enemy alien on habeas corpus in *United States ex rel. Jaegeler v. Carusi*, 342 U.S. 347 (1952), finding that Congress's termination of the war against Germany in 1951 ended the power of the Executive under the Alien Enemies Act.[13]

Ever since the Act was first invoked, in the War of 1812, courts have permitted detained enemy aliens to challenge on habeas corpus whether their detention complied with the statutory framework.[14] In *Lockington's Case*, Brightly 269 (Pa. 1813), the Pennsylvania Supreme Court reviewed the

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(No. IV) Relative to the Protection of Civilian Persons in Time of War, arts. 38, 42, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[12] *See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 Green Bag 2d 39 (2005).

[13] The Court rejected the government's claimed authority to execute removal orders that had been issued against dangerous enemy aliens before termination of the war. *See* Brief for Respondents, *United States ex rel. Jaegeler v. Carusi*, 342 U.S. 347 at 26-27.

[14] The Court has upheld the scheme of the Act against constitutional challenge, citing its lengthy historical pedigree, but has never accepted the theory that enemy aliens lack constitutional rights. *See Ludecke v. Watkins*, 335 U.S. 160, 171-72 (1948); *cf. Von Moltke v. Gillies*, 332 U.S. 708 (1948) (vindicating on habeas the Sixth Amendment rights of an enemy alien prosecuted in 1943). The Court also held in *Ludecke*, 335 U.S. at 166-70, that authority under the Act continued beyond the apparent end of hostilities until formal termination of the war.

detention of a British subject, concluding that the Act gave the executive the option whether or not to seek judicial assistance in enforcing its policy.

In *Ludecke v. Watkins*, 335 U.S. 160 (1948), Justice Frankfurter summarized habeas practice under the Alien Enemies Act in the First and Second World Wars—the last occasions on which it was ever applied. The Court made clear that detained individuals were entitled "to challenge the construction and validity of the statute" and the factual predicates for applying it to them, including "the existence of the 'declared war,'" and "whether the person restrained is in fact an alien enemy fourteen years of age or older." *Id.* at 171 & n.17. Accordingly, federal courts in the 1940s permitted German enemy aliens to challenge the government's effort to remove them to Germany without giving them an opportunity to depart voluntarily for another destination.[15]

Most importantly, individuals detained as enemy aliens have been permitted to challenge on habeas the determination of their enemy alien status, either on the ground that they were in fact citizens, or because they were aliens but not natives or nationals of an enemy power. *See Ludecke*, 335 U.S. at 171 n.17, 165 n.8 and cases cited therein.

Finally, enemy aliens have always had access to the writ, whatever the reason for their detention. During the War of 1812, a federal court entertained, though later denied on the merits, habeas writs filed by British subjects in the U.S. army

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[15] *See, e.g., United States ex rel. Hoehn v. Shaughnessy*, 175 F.2d 116 (2d Cir. 1949) (finding adequate opportunity to depart); *United States ex rel. Ludwig v. Watkins*, 164 F.2d 456 (2d Cir. 1947) (granting the writ); *United States ex rel. von Heymann v. Watkins*, 159 F.2d 650 (2d Cir. 1947) (granting the writ). The two latter cases involved German nationals who had been brought to the United States involuntarily and detained as dangerous enemy aliens.

seeking release from military service.[16] When the federal government sought to deport enemy alien internees under the immigration laws, the courts permitted them access to the writ.[17] Habeas corpus was also available to enemy aliens prosecuted for war-related crimes in Article III courts.[18]

C. Prisoners Of War Are Entitled To Habeas Corpus

Both historical and modern practice make clear that habeas corpus is available even to foreign prisoners of war to test the lawfulness of their detention. Where genuine issues arise, habeas corpus has been made available to foreign prisoners of war who dispute their classification or who challenge the military's power to try them for war crimes.[19] As this Court noted in *Rasul v. Bush*, 542 U.S. 466, 481 n.11 (2004), in one Eighteenth Century case, the King's Bench employed the writ to determine and reject a challenge to detention by a Swedish sailor who had been forced to serve on the crew of a French privateer. *King v. Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759). In the *Case of Three Spanish Sailors*, 2 W. Bl. 1324, 96 Eng. Rep. 775 (C.P. 1779), the court entertained a motion for the writ by three captured prisoners of war who had been tricked into working on a British ship. The court

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[16] *Wilson v. Izard*, 30 F. Cas. 131 (C.C.D.N.Y. 1815) (No. 17,810). For similar cases from later wars, see *United States ex rel. Cascone v. Smith*, 48 F. Supp. 842 (D. Mass. 1943); *United States ex rel. Warm v. Bell*, 248 F. 1002 (E.D.N.Y. 1918).

[17] *See, e.g., United States ex rel. Bradley v. Watkins*, 163 F.2d 328 (2d Cir. 1947) (granting the writ to former internee, who had been forcibly brought to the United States from Greenland); *United States ex rel. Sommerkamp v. Zimmerman*, 178 F.2d 645 (3d Cir. 1949) (denying the writ on the merits to former internee who had been forcibly brought to the United States from Guatemala).

[18] *See Von Moltke v. Gillies*, 332 U.S. 708 (1948) (espionage).

[19] The clarity of the right to detain helps to explain why proceedings were not brought on behalf of German soldiers brought to the United States as prisoners of war in the Second World War.

held on the merits that, by their own showing, they were not entitled to be released, thus confirming the availability of the writ to prisoners of war who claim wrongful detention.[20]

In three landmark cases, this Court has exercised habeas corpus jurisdiction over conceded prisoners of war—whether privileged or unprivileged combatants—challenging their trial by military commission.[21] In *Ex parte Quirin*, 317 U.S. 1, 24-25 (1942), the Court passed quickly to the merits and ruled against the petitioners. *In re Yamashita*, 327 U.S. 1 (1946), which involved an enemy soldier in the U.S. overseas territory of the Philippines, rejected the government's objection to habeas corpus jurisdiction, holding that absent a

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[20] Although these cases have sometimes been misunderstood as indicating that prisoners of war lack standing to apply for the writ, the British cases have actually turned on the merits determination

> that the applicant is both in fact and in law a prisoner of war detained by authority of the Crown. The application discloses no cause for the writ to issue, and it will be dismissed on that basis. If, however, it appears that the applicant may have been improperly detained as a prisoner of war, or is a prisoner of war on licence and detained for some other cause, the court will investigate the propriety of the detention. Capacity to apply has nothing to do with the matter: it is purely a question of whether a case can be made out for the remedy

R.J. Sharpe, *The Law of Habeas Corpus* 116 (2d ed. 1989) (footnote omitted).

Lockington's Case, Brightly 269 (Pa. 1813), is also consistent with the right of individuals who dispute their classification as prisoners of war to the writ, because Lockington's British nationality was unquestioned and even a dissenting judge who equated enemy aliens with prisoners of war would have permitted such a prisoner to challenge his enemy status by affidavit. Brightly's Rep. at 295-96, 298-99 (Brackenridge, J.).

[21] *Accord United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y. 1920), *appeal dismissed by stipulation*, 256 U.S. 705 (1921). The German naval officer's challenge to the authority to try him by court-martial became moot after Congress terminated wartime powers. *See* J. Res. 66th Cong. (Mar. 3, 1921), 41 Stat. 1359; 32 U.S. Op. Atty. Gen. 505.

suspension of the writ, the courts had "the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus."[22] In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), this Court ruled in favor of an alleged "enemy combatant" held at Guantanamo both on jurisdiction and on the merits. Emphasizing "'the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty,'" *id.* at 2772 (quoting *Quirin*, 317 U.S. at 19), this Court invalidated the proceeding as unauthorized by law.

Absent a legitimate suspension, the traditional scope of the writ must also extend to alleged "enemy combatants." Indeed, the Government's expansive interpretations of the concepts of "enemy combatant" and the "war on terror," and the very real factual questions surrounding some of the detentions, heighten the specter of imprisonment by Executive fiat and the corresponding importance of habeas.[23]

III. ALIENS IN TERRITORY UNDER THE COMPLETE JURISDICTION AND CONTROL OF THE UNITED STATES, SUCH AS GUANTANAMO, ARE PROTECTED BY THE SUSPENSION CLAUSE

Without disproving any of the foregoing, the court of appeals simply denied that petitioners are entitled to any constitutional protection whatsoever, because Guantanamo Bay Naval Base lies outside the formal borders of the United

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[22] *Id.* at 9 (Stone, C.J.). *See also id.* at 30 (Murphy, J., dissenting) (agreeing that the government's "obnoxious" jurisdictional argument had been "rejected fully and unquestionably").

[23] *Cf. Hamdi v. Rumsfeld*, 542 U.S. at 516, 522 n.1; *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 474-76 (D.D.C. 2005) (discussing the tenuous links to hostile organizations and persons that the Executive considered sufficient to support classification as an "enemy combatant"), *rev'd on other grounds sub nom. Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

States. The court below reasserted its own prior analysis in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), despite its previous rejection by this Court in *Rasul v. Bush*, 542 U.S. 466 (2004). The court failed to acknowledge this Court's case law and the history of governance of overseas territories, which plainly demonstrate that fundamental constitutional limitations such as the Suspension Clause apply to foreign nationals detained at Guantanamo.[24]

As this Court observed in *Rasul*, the United States does not possess ultimate sovereignty over Guantanamo, but occupies that territory under an unusual indefinite lease, which provides that "'the United States shall exercise complete jurisdiction and control over and within said areas'" during the period of occupation. 542 U.S. at 471 (citation omitted). At Guantanamo, the United States is accountable only to itself. U.S. law is the only law recognized.

This Court held in *Rasul v. Bush* that the presumption against extraterritoriality of U.S. law had no application at Guantanamo, because petitioners were being "detained within 'the territorial jurisdiction' of the United States." 542 U.S. at 480 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). The *Rasul* Court found *Johnson v. Eisentrager*, 339 U.S. 763 (1950)—which the court of appeals has nonetheless continued to view as controlling—distinguishable in numerous critical respects, most fundamentally that "the United States exercises exclusive jurisdiction and control" at Guantanamo. 542 U.S. at 476. Justice Kennedy also found *Eisentrager* inapposite, emphasizing that "Guantanamo Bay is in every practical respect a United States territory." 542 U.S. at 487 (Kennedy, J., concurring in the judgment).

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[24] *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2094-95 (2007) (foreign nationals at Guantanamo are constitutionally entitled to habeas).

Although this Court's ultimate holding in *Rasul v. Bush* was statutory and jurisdictional, the Court noted the merit of petitioners' claims to constitutional protection in a key footnote.[25] *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 462.

As discussed herein, our history records other examples of territory outside U.S. territorial borders and sovereignty, but still under the complete jurisdiction and control of the United States: most prominently, the Canal Zone in Panama and the Trust Territory of the Pacific Islands. In each, the United States gained full jurisdiction and control over the territory without ever acquiring actual sovereignty. U.S. courts found that fundamental constitutional limitations apply to aliens in such territory, without regard to whether the United States is sovereign over it.

A. Fundamental Rights Apply In Territories Under Complete U.S. Jurisdiction And Control

"The United States is entirely a creature of the Constitution. Its power and authority have no other source." *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion) (footnote omitted); *id.* at 74 (Harlan, J., concurring in the result); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring). The question before this Court is

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[25] *See Rasul v. Bush*, 542 U.S. at 483 n.15 ("Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U. S. § 2241(c)(3). Cf. *United States v. Verdugo-Urquidez*, 494 U. S. 259, 277-278 (1990) (Kennedy, J., concurring), and cases cited therein."). The citation to Justice Kennedy's opinion in *Verdugo-Urquidez*, discussed *infra*, makes clear that the Court was referring to constitutional violations.

thus not whether the Constitution is "in force" on Guantanamo, but rather, which particular constitutional limitations apply there.

In the Nineteenth Century, this Court fully applied the Bill of Rights to all federally-governed territories. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1879); *Springville v. Thomas*, 166 U.S. 707 (1897). In 1901, however, in the *Insular Cases*,[26] a majority of the Court held that only "fundamental" constitutional rights extended by their own force to "unincorporated" territories. The *Insular Cases* concluded that constitutional provisions do not extend to particular territory by the will of Congress, but rather, as a result of the *relationship* that Congress creates between the United States and the territory. *Downes v. Bidwell*, 182 U.S. 244, 289 (1901) (opinion of White, J.); *Dorr v. United States*, 195 U.S. 138, 142 (1904). The *Insular Cases* struck a compromise between the forces of constitutionalism and the forces of empire by guaranteeing that the Constitution's most fundamental rights would be honored wherever the United States possesses governing authority. In such cases, it is the exercise of complete U.S. jurisdiction and control, not nominal sovereignty, that justifies the application of a correlative set of fundamental rights.

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[26] The series of *Insular Cases* established the constitutional framework for "unincorporated" overseas territories. The doctrine first expounded in Justice Edward White's concurring opinion in *Downes v. Bidwell*, 182 U.S. 244, 287 (1901), gained the adherence of the majority in *Dorr v. United States*, 195 U.S. 138 (1904). It distinguished earlier cases as involving territories "incorporated" into the United States, and held that not all constitutional limitations extended to "unincorporated" territories acquired during the Spanish-American War. Despite steady criticism, this Court has never repudiated the *Insular Cases*. *See Torres v. Puerto Rico*, 442 U.S. 465 (1979); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990); *Rayphand v. Sablan*, 95 F. Supp. 2d 1133 (D.N.Mar.I. 1999), *aff'd mem. sub nom. Torres v. Sablan*, 528 U.S. 1110 (2000).

The court of appeals denied the relevance of these cases, reasoning that the political branches had defined Guantanamo as outside the scope of the "United States" for purposes of the Detainee Treatment Act. 476 F.3d at 992 (citing DTA § 1005(g)). But the precise lesson of the *Insular Cases* is that Congress cannot turn the Constitution on and off at will. Congress can no more "turn off" the Constitution for Guantanamo than it can nullify the Constitution in the District of Columbia by a statutory definition placing the District outside the "United States." It is the objective relationship that the political branches create between the United States and a particular tract of territory, not Congress's expressed desire to exclude a particular right, that determines how the Constitution applies there.[27]

Before the Second World War, this Court also assumed that constitutional rights were unavailable to both citizens and aliens in territory not governed by the United States. This obsolete assumption reflected the rigidly territorial methodology of turn-of-the-century conflict of laws. *Compare, e.g., In re Ross*, 140 U.S. 453, 464 (1891) (Field, J.), *with Pennoyer v. Neff*, 95 U.S. 714, 722 (1878) (Field, J.). But reliance on that assumption became untenable after the

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[27] The court of appeals also misconstrued *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948), as conditioning applicability of the U.S. Constitution and laws on the assertion of U.S. sovereignty over a territory, and therefore making it nonjusticiable. *See* 476 F.3d at 992. In fact, *Vermilya-Brown* emphasized that whether legal norms apply to overseas bases is a justiciable issue, depending on the objective conditions created by prior governmental action. 335 U.S. at 380. The Court further observed that the extent of Congress's powers to regulate overseas bases under the Article IV "Territory or other Property" clause did *not* depend upon obtaining "sovereignty in the political or any sense." *Id.* at 381. For the purpose of applying U.S. wage regulations, the Court perceived no dividing line separating a modern base leased from the United Kingdom in Bermuda from the earlier acquisitions of Guantanamo, the Canal Zone or island territories like Puerto Rico and Guam. *Id.* at 386-90.

Second World War, as new global circumstances prompted, and new technology facilitated, broader extraterritorial activity.

By the middle of the Cold War, this Court had decisively repudiated its geographically restricted approach to the Bill of Rights for citizens in *Reid v. Covert*, 354 U.S. 1 (1957), and *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (providing majority for the plurality position in *Reid v. Covert*). Those cases held that the government must provide the safeguards of Article III and the Fifth and Sixth Amendments before inflicting punishment on civilian citizens accompanying U.S. armed forces abroad. Justice Black wrote for four Justices favoring literal application of the Bill of Rights, while Justices Frankfurter and Harlan applied a "'fundamental right' test . . . . simila[r] to analysis in terms of 'due process.'" 354 U.S. at 53 (Frankfurter, J., concurring in the result); *id.* at 75 (Harlan, J., concurring in the result).

Justice Harlan's separate opinion explained the *Insular Cases* doctrine as resulting from a more general principle that particular constitutional limitations should not be applied "overseas" under circumstances that would render such application "altogether impracticable and anomalous." *Id.* at 74. He viewed this principle as relevant both to U.S. governance of noncontiguous territories and to U.S. action in foreign countries, at least with regard to U.S. citizens.[28]

Justice Kennedy followed Justice Harlan's approach in providing the crucial fifth vote to form the majority in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). That decision held only that the Fourth Amendment does not govern searches of nonresident aliens' property in a foreign country such as Mexico. *Id.* at 261, 274-75. Justice Kennedy, disa-

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[28] This case does not require the Court to address the applicability of constitutional limitations to U.S. government action with regard to foreign nationals in territory under foreign governance, and Amici take no position on that issue here.

greeing with important elements of the plurality's reasoning, inquired instead whether application of particular constitutional limitations "abroad," or in territories with wholly dissimilar traditions and institutions, would be "impracticable and anomalous." *Id.* at 277-78 (Kennedy, J, concurring).

In territories under long-term exclusive U.S. governance, the fundamental rights standard of the *Insular Cases* and the "impracticable and anomalous" inquiry converge. In such locations, where the United States has the ability to structure its own institutions, requiring government officials to respect a fundamental right creates no constitutional anomaly.

The practice of the courts with regard to the Canal Zone and the Trust Territory of the Pacific Islands, also non-sovereign territories under the complete jurisdiction and control of the United States, confirms this conclusion. U.S. courts have, by extrapolation from the *Insular Cases,* found fundamental constitutional rights to be applicable to citizens and aliens within those territories.[29] The same conclusion should apply to Guantanamo.

1. *The Canal Zone*

The Canal Zone shares much common history with Guantanamo. In Panama as in Cuba, early last century, the United States acquired legal rights for a particular purpose in territory within a newly independent state, while reserving underlying sovereignty to the foreign state. *See* Isthmian Canal Convention of 1903, T.S. No. 431, arts. II & III. As the century progressed, resentment of U.S. presence in the Canal Zone led to tensions with Panama, and ultimately to the return of jurisdiction over the Canal Zone under the Panama Canal Treaty of 1977, T.I.A.S. No. 10030.

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[29] For fuller details of these historical precedents, see Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 Loyola L. Rev. 1, 15-32 (2004).

The mode of U.S. governance of the Canal Zone exhibited striking parallels to Guantanamo.[30] It was "in effect one great government reservation." Richard R. Baxter, *The Law of International Waterways* 86 (1964). The Canal Zone government was wholly non-elective; its Governor, traditionally chosen from the Army Corps of Engineers, exercised extensive quasi-legislative and executive powers, subject to a Canal Zone Code enacted by the U.S. Congress and the oversight of the Secretary of the Army and the President. 2 C.Z. Code § 31. The presence of both U.S. citizens and foreign nationals within the Canal Zone was "at the suffer[a]nce of the U.S. Government," *Lucas v. Lucas*, 232 F. Supp. 466 (D.C.Z. 1964), and citizens and aliens alike were subject to deportation from the Zone under broad criteria of public interest. *See* 2 C.Z. Code § 841; 35 C.F.R. § 59.1 (1976).

As the era of colonialism receded, the courts came to protect rights in the Canal Zone just as they treated them in unincorporated territories of the United States.[31] Although

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[30] Both governmental and nongovernmental sources have often emphasized the analogy between Guantanamo and the Canal Zone. *See, e.g., Law of the Sea and International Waterways: Canals*, 1977 *Digest of United States Practice in International Law* § 7, at 593-94 (John A. Boyd ed.); 35 Op. Att'y Gen. 536 (1929); George Stambuk, *American Military Forces Abroad* 19-20 (1963) (analyzing Guantanamo and Canal Zone rights in parallel); Helmut Rumpf, *Military Bases on Foreign Territory, in* 3 *Encyclopedia of Public International Law*, 381, 382-83 (1997) (same); Sedgwick W. Green, *Applicability of American Laws to Overseas Areas Controlled by the United States*, 68 Harv. L. Rev. 781, 792 (1955) (describing the status of Guantanamo as "in substance identical with that in the Canal Zone").

[31] In the first years of the Canal Zone, the courts had maintained that the Constitution was not in force there, *see Canal Zone v. Coulson*, 1 C.Z. 50, 55-56 (1907), *writ of error dismissed for want of jurisdiction*, 212 U.S. 553 (1908), but that approach was abandoned long ago. *See, e.g., Canal Zone v. P. (Pinto)*, 590 F.2d 1344, 1351 (5th Cir. 1979) (United States "occupies but does not own the Canal Zone"; therefore nonfundamental aspects of Confrontation Clause not applicable); *United States v.*

some decisions have relied on a statutory bill of rights set out by Congress in the Canal Zone Code, *e.g., Canal Zone v. Bender*, 573 F.2d 1329 (5th Cir. 1978) (statutory Fourth Amendment), others have subjected U.S governmental actions, including federal statutes, directly to constitutional scrutiny.[32]

The doctrine of the *Insular Cases* concerned the status of territories, not of persons. Fundamental constitutional rights were equally applicable to United States citizens and aliens present in the Canal Zone and other unincorporated territories. *See, e.g., Examining Bd. of Eng., Architects and Surveyors* v. *Flores de Otero*, 426 U.S. 572 (1976) (Puerto Rico). The Fifth Circuit recognized this equality of rights in *Canal Zone* v. *Scott*, 502 F.2d 566, 568 (5th Cir. 1974) ("[N]on-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of

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Husband R. (Roach), 453 F.2d 1054, 1057 (5th Cir. 1971) (characterizing Canal Zone as "unincorporated territory" for constitutional purposes), cert. denied, 406 U.S. 935 (1972); *see also Canal Zone v. Scott*, 502 F.2d 566, 570 (5th Cir. 1974); *Kemp v. Canal Zone*, 167 F.2d 938, 940 & n.1 (5th Cir. 1948) (Confrontation Clause probably not applicable to Canal Zone under the *Insular Cases*); *cf. United States v. Hyde*, 37 F.3d 116, 121 (3d Cir. 1994) (stating that the status of the Virgin Islands, Puerto Rico and the Canal Zone were "not materially different").

[32] *See, e.g., Jimenez v. Tuna Vessel "Granada"*, 652 F.2d 415 (5th Cir. 1981) (holding that due process applies in the Canal Zone); *In re Gayle*, 136 F.2d 973 (5th Cir. 1943) (Canal Zone Code construed against its literal meaning to avoid a due process violation), *cert. denied*, 320 U.S. 806 (1943); *Walker v. Chief Quarantine Officer*, 69 F. Supp. 980 (D.C.Z. 1943) (applying Thirteenth Amendment and due process to a civilian employee of Army); *Canal Zone v. Castillo*, 568 F.2d 405 (5th Cir. 1978) (recognizing that due process applies in Canal Zone, but upholding vagrancy provision of the Code against vagueness challenge), *cert. denied*, 436 U.S. 910 (1978).

the Canal Zone and not the citizenship of the defendant that is dispositive.").[33]

2. *The Trust Territory of the Pacific Islands*

U.S. courts have similarly held that the federal government must respect the fundamental constitutional rights of noncitizen inhabitants of the Trust Territory of the Pacific Islands ("TTPI").[34] After liberating Micronesia in the Second World War, the United States sought to retain strategic control there by establishing a special trust territory under the supervision of the United Nations Security Council. Like the Guantanamo lease, the Trusteeship Agreement gave the United States "full powers of administration, legislation, and jurisdiction." T.I.A.S. No. 1665, art. 3.

Although the TTPI was deemed a "foreign country" for statutory purposes,[35] during the Trusteeship, the United States exercised complete jurisdiction and control over the TTPI

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[33] *See also United States v. Husband R. (Roach)*, 453 F.2d at 1058 ("In areas under the jurisdiction of the United States to which the Fifth Amendment is applicable, an alien is entitled to its protection to the same extent as a citizen."). The Fifth Circuit has also subjected independent congressional legislation as applied in the Canal Zone, allegedly discriminating against noncitizens, to constitutional review. *See Raven v. Panama Canal Co.*, 583 F.2d 169 (5th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979).

[34] The history of the Trust Territory is complex. *See Morgan Guar. Trust Co. v. Republic of Palau*, 924 F.2d 1237, 1238-39 (2d Cir. 1991); Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 487-513 (1989); Stanley K. McLaughlin, Jr., *The Law of United States Territories and Affiliated Jurisdictions* 461-78 (1995).

[35] *See Callas v. United States*, 253 F.2d 838, 839-40 (2d Cir.), *cert. denied*, 357 U.S. 936 (1958) (holding TTPI a "foreign country" for Federal Tort Claims purposes). Persons born in the Trust Territory were aliens in relation to the United States, not United States citizens or United States nationals. *Id.* at 842 (Hincks, J., concurring).

without being sovereign there, much as it does on Guantanamo today.

Accordingly, federal courts have regularly held that the Constitution bound the federal government in its treatment of TTPI inhabitants and other aliens in the Trust Territory.[36] In *Ralpho v. Bell*, 569 F.2d 607, 618-19 (D.C. Cir. 1977), the court held that a congressionally created federal agency in Saipan was limited by the Due Process Clause in its adjudication of inhabitants' claims. The court concluded that because TTPI inhabitants were as fully subject to American governing power as those of an unincorporated territory, fundamental constitutional rights vis-à-vis the federal government extended to the territory.[37] Courts similarly held that other fundamental constitutional rights protected noncitizens there.[38]

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[36] The cases cited above and in the following notes involve direct application of fundamental constitutional rights to noncitizens in the TTPI. Other, local cases were decided under a statutory Bill of Rights in the Trust Territory Code, which bound the Trust Territory government but did not bind Congress or the Secretary of the Interior. The enumerated rights included all the fundamental rights applicable in unincorporated territories under the *Insular Cases*, and the Trust Territory courts interpreted the Code rights as affording at least that level of protection, *see, e.g., Ichiro v. Bismark*, 1 T.T.R. 65 (H.C.T.T. Tr. Div. 1953) (due process right in Trust Territory Code must be interpreted as in United States), but these statutory cases are not the ones on which Amici rely.

[37] The court expressly noted that under the *Insular Cases*, the locality and not the nationality of the plaintiff was determinative. 569 F.2d at 618 n.65 (*citing Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974)).

[38] *See, e.g., Juda v. United States*, 6 Cl. Ct. 441 (1984) (Claims Court held that the Takings Clause extended to the Marshall Islands, and protected the noncitizens there as well as United States citizens); *Temengil v. Trust Territory*, 33 Fair Empl. Prac. Cas. (BNA) 1027, 1058-60, 1983 U.S. Dist. Lexis 18384, at *112-121 (D.N.Mar.I. 1983) (finding Fifth Amendment equal protection and due process requirements directly applicable to salary discrimination in TTPI government employment),

B. Because Guantanamo Is Territory Under Complete U.S. Jurisdiction And Control, Aliens There Are Protected By The Suspension Clause

Like the Canal Zone and the Trust Territory, Guantanamo is a territory where, although the United States is not sovereign, fundamental constitutional rights apply to citizens and aliens alike by virtue of complete U.S. jurisdiction and control.

Guantanamo Bay Naval Base has a total area of over forty-five square miles, thirty-one of them on land.[39] Its land area is roughly the size of St. Thomas, V.I.; it is larger than Manhattan.[40] "The base is entirely self-sufficient, with its own water plant, schools, transportation, and entertainment facilities."[41] In 2003, the base commander described it as "small-town America." Carol Rosenberg, *New chief brings Guantanamo up to date,* Miami Herald (Oct. 25, 2003), 2003 WLNR 14804541. The detention facilities are "hidden away in a restricted area, behind armed checkpoints, several ridgelines away from downtown," and seem not to "disturb the tranquility" of the base. Matthew Hay Brown, *Oldest U.S. Base Overseas Harbors Hometown Feel,* Orlando Sentinel (Dec. 22, 2003), 2003 WLNR 15569954.

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aff'd in part, rev'd in part on other grounds, 881 F.2d 647 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990).

[39] *See* Navy Office of Information, *Statistical Information, U.S. Naval Base, Guantanamo Bay, Cuba* (1985); Wayne S. Smith, *The Base from the U.S. Perspective, in Subject to Solution: Problems in Cuban-U.S. Relations*, 97, 98 (Wayne S. Smith & Esteban Morales Dominguez, eds. 1988).

[40] *See The New Columbia Encyclopedia*, 772, 1681, 2900-901 (William H. Harris & Judith S. Levy, eds. 1975) (32 and 22 square miles, respectively).

[41] Smith, *supra*, note 39, at 98-99.

The unusual extent of U.S. power at Guantanamo reflects the origins of the base during the period of colonialism, when such arrangements were more common. *See* Stambuk, *supra* note 30, at 19-22; Rumpf, *supra* note 30, at 382-83. Guantanamo is the only U.S. overseas base without a Status of Forces Agreement defining the allocation of civil and criminal jurisdiction over military and other personnel. Given the totality of U.S. territorial jurisdiction over the base, and the lack of access to the rest of Cuba since 1959, no such agreement is needed.

The fact that Guantanamo is occupied as a military naval base does not prevent the application of fundamental constitutional rights to aliens detained there.[42] The United States also possesses several "unorganized" insular territories without permanent inhabitants, some of which—such as Wake Atoll—are operated as military installations, but in all of which fundamental constitutional rights apply. *See* General Accounting Office, *U.S. Insular Areas: Application of the U.S. Constitution*, GAO/OGC-98-5, at 7-10, 39-63 (1997). The other non-sovereign territories in which U.S. courts have applied constitutional rights have also had military features.[43]

To accept the lower court's denial of all constitutional rights to aliens at Guantanamo would affect far more than alleged enemy combatants. First, for more than a century,

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[42] Justice Edward White, in first expounding his theory that only fundamental constitutional limitations extend to "unincorporated" territories, explicitly mentioned the applicability of his theory to areas like Guantanamo—"a naval station or a coaling station on an island"—and the Canal Zone—an "inhabited strip of land" adjoining "an interoceanic canal." *Downes v. Bidwell*, 182 U.S. 244, 311 (1901) (opinion of White, J.).

[43] The Canal Zone was a quasi-military reservation administered under Army supervision, subject to access restrictions even for U.S. citizens. The Pacific Islands were the sole example of a "strategic trust territory" created under Article 82 of the United Nations Charter, which the United States administered for defensive purposes and for nuclear testing.

operation of the base has traditionally been dependent on foreign labor, and the United States has employed hundreds of foreign nationals at Guantanamo, including Cubans and Jamaicans and more recently Filipinos whom the decision below would leave without legal recourse.[44]

Second, in the 1990s the Government repeatedly used Guantanamo as a holding center for thousands of asylum seekers captured at sea from Haiti and Cuba, as well as from China.[45] In litigation over the rights of detained asylum seekers, the Second and Eleventh Circuits pointedly disagreed about the applicability of the Bill of Rights to aliens at Guantanamo. *Compare Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992) (affirming preliminary injunction because plaintiffs were likely to succeed on their constitutional claims), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993), *with Cuban-American Bar Ass'n v. Christopher*, 43 F.3d 1412 (11th Cir. 1995) (denying that rights exist).[46] Although the Second Circuit decision was eventually vacated as moot, Amici submit that it

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[44] *See* Associated Press, *In Cuba, U.S. Relies on Low-Paid Help of Non-Americans*, Commercial Appeal (Memphis, TN), Feb. 1, 2002, at A7, 2002, WLNR 7300249 (noting presence of 1000 foreign workers); *Filipino residents register to vote*, 63(34) Guantanamo Bay Gazette 4 (Aug. 25, 2006),www.cnic.navy.mil/navycni/groups/public/@pub/@southc/@guantanomobay/documents/document/cnic_048662.pdf (700 Philippine nationals on Guantanamo registered to vote in home country).

[45] *See, e.g., United States v. Li*, 206 F.3d 56, 69 n.1 (1st Cir.) (Torruella, C.J., dissenting), *cert. denied*, 531 U.S. 956 (2000) (noting government's use of Guantanamo as an interim detention center for interdicted Chinese).

[46] In *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), this Court rejected a statutory and treaty-based challenge to the Government's authority to return asylum seekers to Haiti directly from interdiction on the high seas, but did not address any legal issues relating to Guantanamo.

remains the better-reasoned opinion.[47] To this day, the U.S. Coast Guard continues to bring Cubans and Haitians to Guantanamo for detention pending possible resettlement.[48]

Third, the Government has now built a permanent prison on the base. If this Court were to hold that foreign nationals lack any rights on Guantanamo, the Government could use that prison not just for suspected enemies, but also for extra-territorial arrest and punishment of suspected drug traffickers, smugglers, or other alleged criminals, all outside the constitutional safeguards of the criminal justice system. Even after a later Administration had ceased to use the prison for security detainees, it would remain as an option susceptible to abuse.

In the past, the United States has exercised criminal jurisdiction over both citizens and aliens at Guantanamo, to the exclusion of Cuban law, and has traditionally brought civilian criminal defendants to the United States for prosecution, with

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[47] Respondents were fully aware of the Second Circuit's ruling, and of the possibility that the courts would eventually hold that fundamental constitutional limitations apply to detainees at Guantanamo, before they began transporting detainees there. *See* Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Att'y Gens., Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Defense, *Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001), http://www.texscience.org/reform/torture/philbin-yoo-habeas-8dec01.pdf. (concluding in December 2001, after a review of existing case law, that "a detainee could make a non-frivolous argument that [habeas] jurisdiction does exist over aliens detained at [Guantanamo Bay, Cuba], and we have found no decisions that clearly foreclose the existence of habeas jurisdiction there."). Indeed, nearly two decades earlier, the Justice Department's Office of Legal Counsel had found that the base came within the federal Anti-Slot Machine Act. *Installation of Slot Machs. on U.S. Naval Base, Guantanamo Bay*, 6 Op. Off. Legal Counsel 236, 237, 242 (1982). It would be anomalous if the base did not equally fall within the habeas corpus laws.

[48] *See* Assistant Secretary Sauerbrey Discusses Humanitarian Assistance, USINFO Webchat transcript (Nov. 17, 2006), http://usinfo.state.gov/usinfo/Archive/2006/Nov/20-718507.html.

full constitutional protection. *United States v. Lee*, 906 F.2d 117 (4th Cir. 1990) (Jamaican national); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (U.S. citizen). Yet under the Government's current reasoning, the United States could have prosecuted and convicted foreign nationals before military tribunals on Guantanamo, or even executed them there without ever affording them any constitutional rights, including habeas corpus.

Nor can there be any doubt as to the fundamentality of the right to habeas corpus, which the Government must make available to Guantanamo detainees. Zechariah Chafee rightly called it the "most important human right in the Constitution."[49] "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom." *Ex parte Yerger*, 75 U.S. 85, 95 (1868). It was one of the few rights that even the Federalists considered necessary to safeguard in the 1787 Constitution; Hamilton emphasized its presence as one of the reasons why a fuller Bill of Rights would not be needed. *The Federalist* No. 84. Every state constitution guarantees it. *See supra* note 6. *See also In re Yamashita*, 327 U.S. 1, 9 (1946) (emphasizing "the duty and power" of the courts to inquire into the lawfulness of trials by military commission in the Philippines, absent suspension of the writ).

To the extent that a relevant consideration is whether the right is "a fundamental right in the international sense,"[50] habeas corpus satisfies that criterion as well. With or without its Latin name, the right to a judicial remedy against unlawful

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[49] Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. Rev. 143, 143 (1952).

[50] *See Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1138 (D.N.Mar.I. 1999), *aff'd mem. sub nom. Torres v. Sablan*, 528 U.S. 1110 (2000) (finding that the right to an equally apportioned Senate was not fundamental in this sense, and thus did not apply in unincorporated territories).

detention has become part of the common heritage of mankind. The Covenant on Civil and Political Rights and the European and American regional human rights conventions all include it with similar wording.[51]

Nor may application of the Suspension Clause at Guantanamo reasonably be characterized as "impracticable and anomalous." The base is securely under military governance, and access to it is tightly controlled. Indeed, that is a principal reason why the Government has transported prisoners halfway around the world to hold them there. It would be "practicable" for the United States Government to implement an orderly process of judicial review for detainees there, as it has done in other island territories or with respect to its criminal jurisdiction on Guantanamo itself.

In sum, application of the Suspension Clause to petitioners, who have been subject to long term detention at the Guantanamo Bay Naval Base, would be neither "impracticable" nor "anomalous." What would be anomalous is authorizing the United States Government to create and run an offshore

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[51] International Covenant on Civil and Political Rights, art. 9(4), Dec. 19, 1966, 999 U.N.T.S. 171 ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."); [European] Convention for the Protection of Fundamental Rights and Freedoms, art. 5(4), Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights, art. 7(6), July 17, 1987, 1144 U.N.T.S. 123. Under the American Convention, the right is so fundamental as to be considered nonderogable, i.e., not subject to suspension in emergency situations. *Id.* art. 27(2). Thus, Justice Jackson's passing suggestion in *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950), that the right to habeas corpus was "generally unknown" outside the Anglo-American world was mistaken at the time, and is now thoroughly obsolete. Even *Eisentrager* conceded that enemy aliens convicted of war crimes in an unincorporated territory (namely, the Philippines) were entitled to habeas corpus. *Id.* at 779-80.

prison camp in a "rights-free zone" for the express purpose of evading constitutional restrictions.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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